91-1193

No. _____

Supreme Court, U.S.
FILED
JAN 21 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

NEW BERLIN GRADING CO., INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

SUNNY SLOPE GRADING, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

(Caption Continued On Inside Cover)

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

ANNE B. SHINDELL
Counsel of Record
LAWRENCE M. SHINDELL
M. ELIZABETH BURNS
SHINDELL & SHINDELL
411 East Wisconsin Avenue
Milwaukee, Wisconsin 53202-4409
(414) 276-1100
Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

SCHNEIDER EXCAVATING, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

STOEHR GRADING CO., INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

QUESTION PRESENTED FOR REVIEW

Whether the National Labor Relations Board may deviate from its precedent to the contrary and as a matter of discretion unilaterally include fringe employees in an established bargaining unit without first providing the fringe employees a self-determination election as required by the *Globe* doctrine?

LIST OF PARTIES AND RULE 29.1 LIST

The parties to the proceedings below were petitioners New Berlin Grading Co., Inc., Sunny Slope Grading, Inc., Schneider Excavating, Inc., and Stoehr Grading Co., Inc.; and respondent-cross-petitioner, the National Labor Relations Board (subsequently the Board). International Union of Operating Engineers, Local No. 139, AFL-CIO, (subsequently the Union) intervened and cross-petitioned for enforcement of the Board orders before the United States Court of Appeals for the Seventh Circuit.[1]

None of petitioners has parent or subsidiary companies.

---

[1] Petitioners are subsequently individually identified as New Berlin, Sunny Slope, Schneider, and Stoehr.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
LIST OF PARTIES AND RULE 29.1 LIST	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THIS PETITION	8
THE COURT OF APPEALS' REJECTION OF THE *GLOBE* DOCTRINE CONSTITUTES A MAJOR DEPARTURE FROM PRECEDENT	10
1. THE EMERGENCE OF THE *GLOBE* DOCTRINE	11
2. A PRESENCE OF COMMUNITY OF INTEREST IS NOT DISPOSITIVE OF THE ISSUE IN THIS CASE	15
D.V. DISPLAYS DOES NOT APPLY TO THIS CASE	17
1. A QUESTION OF REPRESENTATION EXISTS ONLY AMONG THE MECHANICS, NOT AMONG THE UNIT OF HEAVY EQUIPMENT OPERATORS	18
2. THE MECHANICS DO NOT REPRESENT A HISTORICAL "FRINGE DEFECT" AS WAS INVOLVED IN *D.V. DISPLAYS*	21
IN THESE CIRCUMSTANCES THE BOARD WAS REQUIRED TO PROVIDE THE MECHANICS A SELF-DETERMINATION ELECTION	23

TABLE OF CONTENTS – Continued

Page

SUMMARY AND CONCLUSION 24

APPENDIX A-1

TABLE OF AUTHORITIES

Page

CASES

Chrysler Corporation, 173 NLRB No. 160, 69 LRRM 1506 (1968) 23

D.V. Displays, 134 NLRB 568, 49 LRRM 1199 (1961) ..... *passim*

Fort Worth Stockyards, 109 NLRB 1452 (1954) 13

Globe Machine & Stamping Co., 3 NLRB 294, 1-A LRRM 122 (1937) 2, 8, 11

John Deklewa & Sons, 282 NLRB 1375, 124 LRRM 1185 (1987) 3, 24

Kalamazoo Paper Box Corp., 136 NLRB 134 (1962) 11

Krambo Food Stores, Inc., 119 NLRB 369 (1957) 13

Montana-Dakota Utilities Co., 110 NLRB 1056, 35 LRRM 1195 (1954) 12

NLRB v. American Printers & Lithographers, 820 F.2d 878 (7th Cir. 1987) 13

NLRB v. Southern Indiana Gas & Elec., 853 F.2d 580, 129 LRRM 2092 (7th Cir. 1988) 13

NLRB v. Weyerhaeuser Co., 276 F.2d 865 (7th Cir. 1960) 13

Phototype, Inc., 145 NLRB 1268, 1972, 55 LRRM 1140 (1964) 14

Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146 (1941) 10

School Board of Polk County v. Florida PERC, 112 LRRM 3443, 399 So.2d 520 (1981) 14, 15

Syracuse University, 204 NLRB 641, 83 LRRM 1373 (1973) 13

TABLE OF AUTHORITIES – Continued

Page

The Connecticut Light and Power Co., 121 NLRB 768, 42 LRRM 1199 (1958) 14

Typographical Union, Local 88, 196 NLRB No. 33, 79 LRRM 1691 (1972) 23

Zia Co., 108 NLRB 1134, 34 LRRM 1133 (1954) ...12, 17

STATUTES

28 U.S.C. § 1254(1) 2

29 U.S.C. § 158(f) ..... *passim*

29 U.S.C. § 159 3

29 U.S.C. § 159(a) 1

29 U.S.C. § 159(b) 2, 3

LEGISLATIVE MATERIALS

S. Rep. No. 187 86th Cong. 1st Sess. 2345 (1950) 19

SECONDARY SOURCES

E. G. Hall, *The Appropriate Bargaining Unit: Striking a Balance Between Stable Labor Relations and Employee Free Choice*, 18 W. Res. L. Rev. 479, 485 (1967) 9

Fifteenth Annual Report of the National Labor Relations Board (1950) 2, 11

Petitioners New Berlin, Sunny Slope, Schneider, and Stoehr respectfully request that this Court issue a writ of certiorari to review the judgment and opinion of the Court of Appeals for the Seventh Circuit entered in these proceedings on October 22, 1991.

OPINIONS BELOW

The Union filed petitions with the Board seeking certification as the bargaining representative for petitioners' employees under 29 U.S.C. § 159(a). The decision of the Acting Regional Director for the Board, Region Thirty, in *New Berlin* is reprinted in the appendix to this petition at pp. A-22-31. The Board's decision reviewing the Acting Regional Director's decision is printed at 297 NLRB No. 127 (1990) and is reprinted in the appendix at pp. A-32-39.

The Board's decisions in *Sunny Slope, Schneider* and *Stoehr* are reported at 298 NLRB No. 24 (1990), 298 NLRB No. 57 (1990) and 299 NLRB No. 2 (1990), respectively. The text of these decisions are substantially equivalent to the text in *New Berlin* and for this reason the *Sunny Slope, Schneider* and *Stoehr* decisions are not reprinted in the appendix.

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 946 F.2d 52 (7th Cir. 1991) and is reprinted in the appendix at pp. A-9-21.

JURISDICTION

The Opinion and Judgment of the Court of Appeals was entered October 22, 1991. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 158(f)

29 U.S.C. § 159(b)

These statutes are reproduced in the appendix at pp. A-1-8.

STATEMENT OF THE CASE

This is a case of first impression involving the propriety of the Board's unilateral inclusion of a minority group of previously non-union, non-construction employees in an established bargaining unit consisting of heavy construction equipment operators, without allowing the minority employees a self-determination election regarding whether they wished to be represented by the petitioning Union, contrary to established Board and federal precedent known as the *Globe* doctrine.[2]

[2] The *Globe* doctrine is derived from *Globe Machine & Stamping Co.*, 3 NLRB 294, 1-A LRRM 122 (1937). The doctrine requires that an election be held to determine the desires of employees when the union seeks to represent a unit containing two distinct groups of employees. This doctrine is embodied in the NLRB's rules regarding certification petitions where the union seeks to enlarge an existing unit. *See* N.L.R.B. Fifteenth Annual Report, p. 45 (1950).

The recitation of facts contained in the Court of Appeals' opinion reprinted in the appendix is accurate and will not be fully restated. Petitioners are long-standing construction firms who since their inception have maintained voluntary pre-hire agreements with the Union covering petitioners' heavy construction equipment operators. As their industry developed and heavy construction equipment became more sophisticated, petitioners had to hire specially trained mechanics to maintain and repair the equipment. The mechanics were not hired through the Union, never participated in apprentice programs of the Union, never participated in any of the Union's benefit programs, and were never compensated under the terms of the collective bargaining agreement between petitioners and the Union and applicable solely to petitioners' heavy equipment operators. Over the twenty to sixty years of bargaining with petitioners preceding the events material to this case, the Union never sought to represent the mechanics through the traditional organizing means provided for in 29 U.S.C. § 159.[3]

In 1990, the Union petitioned the Board through the procedural methods first established in *John Deklewa & Sons*, 282 NLRB 1375, 124 LRRM 1185 (1987)[4], to seek

---

[3] All subsequent citation to the National Labor Relations Act will be to the NLRA section and not the United States Code section, *i.e.*, 29 U.S.C. § 159(b) will be cited NLRA § 9(b).

[4] In *John Deklewa & Sons*, 282 NLRB 1375, 124 LRRM 1185 (1987), the NLRB announced the following principles relevant to the present case:

1. § 8(f) pre-hire agreements may no longer be repudiated once they are voluntarily signed

(Continued on following page)

recognition as the exclusive bargaining representative for a unit consisting of both petitioners' heavy equipment operators and their mechanics. At the time, the Union represented petitioners' heavy equipment operators by

---

(Continued from previous page)

unless the employees in the unit vote, in a NLRB conducted election, to reject (decertify) or change their bargaining representative. *Id.* at 124 LRRM 1194.

2. The conversion doctrine will no longer apply and these agreements will not be a contract bar. The representation petition by the union, the employees, or the employer will be processed during the term of the § 8(f) pre-hire agreement. *Id.* If the union wins the election, the relationship becomes a § 9(a) relationship. If the union loses, the contract is unenforceable and the parties will violate the Act if another § 8(f) agreement is signed within twelve months, *Id.* 124 LRRM 1195; but a union will be free at all times to attempt to establish a § 9(a) relationship by traditional means. *Id.* at n. 44.

3. The merger doctrine, which allows employees of a single employer to be folded into a multi-employer bargaining unit, will not apply to unit determinations in these cases. **The employees of a single employer who are covered by the existing § 8(f) agreement will ordinarily constitute the voting unit.** This doctrine does not preclude employees of a single employer from expressing their representational desires simply because their employer has joined a multi-employer association. *Id.* 124 LRRM at 1194 and 1194 n. 42 (emphasis in bold added).

virtue of a § 8(f) agreement[5], but it had never represented or sought to represent petitioners' mechanics.

Petitioners and their mechanics contested the mechanics' inclusion in the unit. In *New Berlin*, the first case to procedurally advance, the Board's Acting Regional Director ruled that the company's mechanics and heavy equipment operators lacked a sufficient community of interest to be automatically included into one voting group. It directed a self-determination election among the mechanics to allow them to determine whether they wished to be added to the existing heavy equipment operators' unit and to be represented by the petitioning Union. This decision is consistent with the *Globe* doctrine and existing Board and federal precedent.

On Union-requested review, the Board reversed and directed an election in one overall unit. The Board's order has the effect of denying the previously unrepresented mechanics choice regarding inclusion in the operators' bargaining unit because in each case the mechanics represent a distinct minority vote.

---

[5] A § 8(f) agreement, also known as a pre-hire agreement, is a collective bargaining agreement which exists only in the construction industry by which the employer contracts with the union regarding the terms and conditions of employment for certain employees without the employees first engaging in a certification election as members of the employer unit. Under this pre-hire agreement, the employers may only hire employees for work covered by the collective bargaining agreement from union hiring halls; membership in the union is a pre-requisite to participation in the hiring hall process.

New Berlin and its mechanics sought an injunction from the United States District Court for the Eastern District of Wisconsin to prevent the unit-wide election proceedings. During the hearing, the district court asked each mechanic whether he wished to be represented by the Union and each testified that he did not. However, the district court declined to exercise jurisdiction because it found that the alternative of refusing to bargain with the Union and then contesting the underlying certification through the means of appeal was available. The relevant excerpts of the transcript of the district court proceedings are reprinted in the appendix at pp. A-40-44.

The Regional Director relied on the Board's decision in *New Berlin* to subsequently order elections in similar overall units in the *Schneider, Sunny Slope* and *Stoehr* recognition cases, based upon substantially equivalent facts in those cases. Petitioners refused to bargain with the Union regarding petitioners' mechanics and appealed the unit determinations to the Seventh Circuit Court of Appeals.

The Court of Appeals recognized that a self-determination election is the required means to allow fringe employees freedom of choice regarding their representation. A-17. However, it denied review of the underlying unit determinations and granted the Board's petition to enforce its orders. It held that, under *D.V. Displays*, 134 NLRB 568, 49 LRRM 1199 (1961), the Board had the discretion to deny a self-determination election among the previously unrepresented mechanics under § 9(a) and

to unilaterally include them in the pre-existing unit of heavy equipment operators. A-21.[6]

---

[6] A self-determination election is by definition a separate election among the employees sought to be included in a bargaining unit.

The Court of Appeals found that it would have been reasonable for the Board to have conducted a self-determination election among the mechanics. A-18. But rather than holding that a self-determination election among the mechanics was required, it approved an election by the mechanics and the heavy equipment operators as one group. Relying on *D.V. Displays*, it approved a unit-wide election, finding that the equipment operators had never voted to be represented by the union since becoming petitioners' employees. A 19. As will be discussed, *D.V. Displays* is inapposite because it arises in the manufacturing industry to which § 8(f) pre-hire agreements do not apply and in which circumstances unique to the construction industry and which Congress contemplated in enacting § 8(f) do not exist. *See infra*, pp. 16-21.

Petitioners' operators had joined the Union to become trained as heavy equipment operators and after completing Union apprentice training steadfastly remained union members to maintain employment under the Union's hiring hall system. The Court of Appeals found that the operators' desire for Union representation could not be presumed; that the Board could therefore provide the mechanics with elective rights as a part of a unit including the operators, to whom the question of representation would first be presented; and that to this extent the mechanics would be given a self-determination election. A-19.

Although theoretically self-determining for the total group, a unit-wide election is not a self-determination election for a minority group when diluted by the majority of employees whose choice for union representation has been

(Continued on following page)

REASONS FOR GRANTING THIS PETITION

The Court should grant the requested petition because this case raises an important question of first impression regarding the authority and discretion of the Board to make unit determinations in the construction industry when the union invokes *Deklewa* certification procedures. *D. V. Displays*, on which the Board and Court of Appeals both relied, arose in the manufacturing industry, where circumstances differ from those of the construction industry. Section 8(f) was enacted in response to the unique circumstances existing in the construction industry which require the use of pre-hire agreements. Those agreements in turn presume choice of union representation by those employees hired through established union hiring halls to work under pre-hire agreements. Use of *Deklewa* certification procedures in existing § 8(f) contexts will always deny the minority-in-number employees (not covered by § 8(f) agreements, but sought to be included in the existing unit), the right to self-determination required by the NLRA and the *Globe* doctrine. This case first raises on a national level the conflict created by use of *Deklewa* certification procedures in § 8(f) contexts and the effect of refusing to apply the *Globe* doctrine in this context.

The effect and potential for abuse of using *Deklewa* certification procedures to automatically accrete into

---

(Continued from previous page)

asserted. Where a reasonable basis exists to conclude that the majority group's choice of representation is a substantially forgone conclusion, a self-determination election by the minority group must be employed to insure the true self-determination that the NLRA requires.

pre-existing and represented bargaining units employees who are not represented by the union and do not wish union representation is very real. It is illustrated by the case of one of the mechanics whose interests are before this Court and whose case hallmarks in only one way the plight of all similarly situated construction industry employees nation-wide. One of petitioners' mechanics to be placed into the heavy equipment operators' unit has been employed by the relevant company since 1947 and nears retirement. If removed from the company's pension plan, he will lose his full employer-based-plan pension rights for which he has worked for over forty years. Once he loses those rights he will be unable to make up the loss through participation in the Union's pension plan, because of insufficient time to vest in the Union's plan.

Board rules and regulations applicable to certification petitions require employee desire to supersede that of the union, because union desires may be inconsistent with those of the majority of the employees. *See generally*, E. G. Hall, *The Appropriate Bargaining Unit: Striking a Balance Between Stable Labor Relations and Employee Free Choice*, 18 W. Res. L. Rev. 479, 485 (1967). The Court of Appeals' decision permits the Board to reject this rule and to give union objectives unparalleled precedent over employee desires without permitting employee voice in determining their inclusion in a pre-existing unit.

THE COURT OF APPEALS' REJECTION OF THE *GLOBE* DOCTRINE CONSTITUTES A MAJOR DEPARTURE FROM PRECEDENT.

The Board's and the Court of Appeals' decisions are inconsistent with established Board and federal precedent, Board rules and procedure, and the policy underlying the NLRA.

Section 9(b) requires the Board to "assure to employees the fullest freedom in exercising the rights guaranteed by [the NLRA]." This charge includes determining appropriate units for collective bargaining purposes in which the Board is to be guided by presence or lack of community of interest between groups of employees, as evidenced by similarity in job location, duties and training; degree of employee-controlled discretion over job activity; and historical composition of the bargaining unit. But employee desire is to be the deciding factor in close cases. *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146 (1941).

Because Board unit decisions do not determine merely whether a union will gain representation rights – unit configuration significantly affects the scope of collective bargaining and the general rights of the represented employees – the Board has recognized the consequences of inappropriate employee groupings and the Board's resulting responsibility:

> . . . the Board must maintain the two-fold objective of insuring to employees their right to self-organization and freedom of choice in collective bargaining and of fostering industrial peace and stability through collective bargaining . . . . Because the scope of the unit is basic to and

> permeates the whole of the collective bargaining relationship, each unit determination, in order to further effective expression of the statutory purposes, **must have a direct relevancy to the circumstances within which collective bargaining is to take place.** For, if the unit determination fails to relate to the factual situation with which the parties must deal, efficient and stable collective bargaining is undermined rather than fostered.

Kalamazoo Paper Box Corp., 136 NLRB 134, 137 (1962) (emphasis in bold added). The Board's and the Court of Appeals' decisions derogate this principle by defeating the mechanics' right to bargaining representative choice and the stability which collective bargaining is intended to provide.

1. THE EMERGENCE OF THE *GLOBE* DOCTRINE

Self-determination elections are required "where the union seeks to enlarge an existing unit by including a distinct group of employees which has not been part of the unit . . ." *Fifteenth Annual Report of the National Labor Relations Board*, p. 45 (1950). The self-determination election was first embraced in *Globe Machine & Stamping Co.*, 3 NLRB 294, 1-A LRRM 122 (1937), where three craft unions and one industrial union disputed alternative bargaining unit boundaries, and the industrial union petitioned for one plant-wide unit. Factors favoring a plant-wide unit equalled those favoring separate craft units: successful bargaining had been conducted on both plant-wide and departmental bases; plant work flowed through more than one department; industrial employees had some skill but could not be considered true skilled

craftsmen; and each of the unions had previously informally bargained and had separately handled grievances. The Board concluded that a self-determination election was required:

> . . . where the considerations are so evenly balanced, the determining factor is the desire of the men themselves. On this point, the record affords no help . . . The only documentary proof is completely contradictory. **We will therefore order elections to be held separately for the men engaged in polishing and those engaged in punch press work. We will also order an election for the employees of the Company engaged in production and maintenance . . .**
>
> On the results of these elections will depend the determination of the appropriate unit for the purposes of collective bargaining.

Id. at 300 (emphasis in bold added).

The requirement for self-determination elections has been firmly established. The Board has repeatedly required *Globe* self-determination elections to allow previously unrepresented employees to determine whether they wished to be separately represented or added to an existing unit. *Zia Co.*, 108 NLRB 1134, 34 LRRM 1133 (1954) (where union seeks to include fringe group into established unit, a self-determination election to ascertain whether employees wish to be included in larger unit is required); *see also Montana-Dakota Utilities Co.*, 110 NLRB 1056, 35 LRRM 1195 (1954).[7]

---

[7] The Board has continued to permit minority groups of employees with identifiable separate interests to decide

(Continued on following page)

Federal courts have likewise enforced Board-directed *Globe* elections, requiring these elections where competing unions seek to represent identical units and only one union seeks to add unrepresented employees to an existing unit. *NLRB v. Weyerhaeuser Co.*, 276 F.2d 865, 872 (7th Cir. 1960).[8] And state courts which have addressed the

---

(Continued from previous page)

whether they should be represented separately. *Syracuse University*, 204 NLRB No. 85, 83 LRRM 1373 (1973). *Globe* elections have also been granted to employees who were previously excluded from an existing unit but who may later appropriately constitute a separate unit or an addition to the existing unit. *Krambo Food Stores, Inc.*, 119 NLRB 369 (1957); *Fort Worth Stockyards*, 109 NLRB 1452 (1954).

[8] In *NLRB v. American Printers & Lithographers*, 820 F.2d 878 (7th Cir. 1987), the Seventh Circuit Court of Appeals held that the Board properly ordered a self-determination election to allow a group of previously unrepresented pressroom floor helpers to determine whether they wished to be included in the multi-employer bargaining unit already represented by the union or to continue to be unrepresented. It also recently held in *NLRB v. Southern Indiana Gas & Elec.*, 853 F.2d 580, 129 LRRM 2092 (7th Cir. 1988), that a *Globe* self-determination election was required where a minority group of disconnect/bill collectors were accorded the opportunity to choose whether they wished to join an existing unit of 550 production, transmission, and distribution employees or remain unrepresented.

The Court of Appeals in the present case distinguished these and other cases with similar holdings cited by petitioners on the stated basis that, unlike this case, no question of representation existed in the historical unit. A-20-21. This distinction is not true because, in the cases before this Court, no question of representation exists in the historical unit of heavy

(Continued on following page)

issue in non-*Deklewa* contexts have held that self-determination elections must be held where the union seeks to increase its representation by accreting previously unrepresented employees to an established unit.

In *School Board of Polk County v. Florida PERC*, 112 LRRM 3443, 399 So.2d 520 (1981), the Florida Court of Appeals held that its Public Employment Relations Commission erred when it added a previously unrepresented group of public bus garage employees to an existing bargaining unit without permitting the garage employees a self-determination election. The parties agreed that the bus garage employees would not constitute an appropriate unit by themselves. Reviewing the Board precedent also applicable here and decided under NLRA provisions analogous to Florida's Public Employee Relations Act, the *Polk* court held that the bus garage employees were entitled to vote before being added to the represented unit:

> In such cases, the NLRB has never failed to permit a self-determination election among the members of the fringe group before adding them to the existing unit. *Phototype, Inc.*, 145 NLRB 1268, 1972 n.8, 55 LRRM 1140 (1964); *The Connecticut Light and Power Co.*, 121 NLRB 768, 42 LRRM 1199 (1958); *D. V. Displays Corp.*, 134 NLRB 568, 573, 49 LRRM 1199 (1961) (Rodgers and Leedom dissenting). We agree with that approach. . ..

(Continued from previous page)

equipment operators. As demonstrated in text, the operating engineers affirmatively and conclusively delegated their bargaining rights to the Union prior to and independent of their employment with petitioners.

> We are not persuaded there is any public policy reason to deny public employees the same opportunity to vote on the matter before adding those employees to an existing collective bargaining unit.

Id. 112 LRRM at 3445.

The Acting Regional Director followed this precedent when he directed the self-determination election in *New Berlin*. His determination is the proper one.

2. A PRESENCE OF COMMUNITY OF INTEREST IS NOT DISPOSITIVE OF THE ISSUE IN THIS CASE.

The Board and the Court of Appeals focussed on the arguable presence of community of interest between petitioners' heavy equipment operators and their mechanics in approving the unit-wide election among both employee groups. A-15-16. But whether community of interest exists in the case is not legally relevant to whether a self-determination election was required only among the mechanics, nor does it create any presumption against a self-determination election.

In making unit determinations, the Board must first consider whether employees potentially to be added to a preexisting unit or combined as an original unit have community of interest.[9] Without community of interest,

---

[9] The Court of Appeals stated in its opinion that petitioners conceded the mechanics could properly be included in the bargaining unit consisting of operators, because petitioners did not appeal the Board's finding of community of interest. A-15-16.

(Continued on following page)

distinct employee groups may not be combined. However, once community of interest is found, unit determination may be resolved in one of two ways. Where the Board's investigation demonstrates that both groups clearly are part of one unit, i.e., true community of interest, and a question of representation exists in the historical unit, the situation in *D.V. Displays*, a self-determination election may not be required. But a self-determination

---

(Continued from previous page)

Petitioners' decision not to appeal that finding is not relevant. Even if the mechanics and heavy equipment operators **may** be included in one unit, because they arguably possess sufficient community of interest, this does not control whether the mechanics are entitled to a self-determination election in order to determine whether they want the union representation.

In three of the cases before this Court, the Union bargained on behalf of petitioners' heavy equipment operators for over twenty years, and in the case of *Schneider*, for sixty years. This history of bargaining creates a community of interest among the represented employees which the unrepresented employees do not share. By contrast, the mechanics during the same extensive time period achieved a completely separate history of compensation, working conditions and benefits, and participated in and vested in different pension programs.

The separate bargaining histories demonstrate the distinct character of each groups' employment. The operators are all seasonal construction employees. Therefore, they have never bargained for or received paid vacations, and the payment for their fringe benefits has been structured to account for the seasonal nature of their employment. The mechanics are permanent year-round employees, and each group of mechanics has obtained a compensation and benefit program appropriate to its concerns.

election is required where the Board has found that *sufficient* community of interest exists to permit a single bargaining unit, i.e., it is equally proper for the employee groups to be either a single or separate units, and no question of representation exists in the historical unit. *See Zia Co., supra.*

The Acting Regional Director and the Court of Appeals both found that it was equally proper for petitioners' mechanics and heavy equipment operators to be separate units or one unit. A-18; A-26. A self-determination election was therefore required. The Board and Court of Appeals were wrong in not applying the *Globe* doctrine to require separate elections in this case.[10]

D.V. DISPLAYS DOES NOT APPLY TO THIS CASE.

In denying petitioners' mechanics the right to self-determination elections, the Board and the Court of Appeals in the end solely relied on *D.V. Displays*, 134 NLRB No. 44, 49 LRRM 1199 (1961). The Board and the

---

[10] As explained, *see* text at pp. 8-9, a unit-wide election deprives the employees whom the union seeks to include in the existing unit their right to choose their bargaining representative whenever the independent employees represent a distinct minority of all employees if considered as one group, and the existing unit has already affirmatively delegated their bargaining rights to the union. As a minority-in-number group, the former can never effectively voice their choice and are conclusively deprived of their rights to self-determination. Under these circumstances, it is the will of the union (through the majority voice of the already represented employees), not the will of the unrepresented employees that will control.

Court of Appeals applied *D.V. Displays* to these cases based upon their conclusion that, as in *D.V. Displays*:

> 1. A question of representation existed in both the historical and fringe unit; and
>
> 2. It was proper for the two groups [the heavy equipment operators and mechanics] to be included in a single unit, and it was therefore logical to assume that the separation was attributable to a fringe defect.[11]

A-18-20.

1. A QUESTION OF REPRESENTATION EXISTS ONLY AMONG THE MECHANICS, NOT AMONG THE UNIT OF HEAVY EQUIPMENT OPERATORS.

The Court of Appeals' equation of petitioners' cases with the fringe defect in *D.V. Displays* is wrong because the labor force characteristics of the construction industry differ significantly from those of the manufacturing industry involved in *D.V. Displays*.

A self-determination election is intended to further NLRA policy by providing the means for a previously unrepresented group of employees to express choice regarding union representation. The Senate Report on the Landrum-Griffin amendments to the NLRA makes clear that the amendments were enacted to correct substantial shortcomings in the Act as applied to the construction industry, engendered because the original terms were

---

[11] The Court of Appeals also considered the cases cited by the petitioners regarding self-determination elections to be inapplicable, as discussed at p. 13, n. 8, para. 2, *supra*.

drafted to address the manufacturing industry. S. Rep. No. 187 86th Cong. 1st Sess. 2344 (1959).

Landrum-Griffin Act amendments formally permitted pre-hire agreements in the construction industry; and the enactment was with the clear recognition that a majority, if not all, of construction workers employed under § 8(f) pre-hire agreements will have already affirmatively chosen the union as their bargaining representative:

> A substantial majority of the skilled employees in this industry constitute a pool of such help centered about their appropriate craft union. If the employer relies upon this pool of skilled craftsmen, members of the union, there is no doubt under these circumstances that the union will in fact represent a majority of the employees eventually hired.

S. Rep. No. 187 86th Cong. 1st Sess. 2345 (1959).

The Landrum-Griffin amendments acknowledge that construction industry workers delegate bargaining rights to the union and do so outside the context of a particular employer relationship, that this choice should be recognized, and that this method of delegation is not true in other industries. *Id.* Absent the Landrum-Griffin amendments, successive representation elections would be required for employees who had already clearly chosen union representation.

The Court of Appeals concluded that Union representation could not be presumed in petitioners' cases. ("[T]he Board did not have to conclude that the operators' support for the union was a forgone conclusion.")

See generally A-17-18; quoted passage at A-19. This conclusion is contradicted by the legislative history of the Landrum-Griffin Act and by the facts of the present cases. The heavy equipment operators had chosen the Union as their exclusive bargaining representative long before the Union sought certification in 1990, having joined the Union independent of a status as petitioners' employees in order to receive union-sponsored apprenticeship training and having subsequently remained Union members to benefit from employment under the Union's hiring hall system. By contrast, petitioners' mechanics never implicitly or explicitly chose the Union as a bargaining representative, never worked under the collective bargaining agreement, never received Union benefits, and were never hired through the Union. Although never formally voting for the Union as employees, each of petitioners' heavy equipment operators had already definitively chosen the Union as his or her bargaining representative.

The lack of a later ratifying and redundant vote is not legally relevant. By petitioning for unilateral inclusion in the established group of heavy equipment operators, where the Union clearly had majority status, the Union was able to extend its jurisdiction over the mechanics regardless of whether the mechanics wished to be represented. If the Union had legitimate representation interests, it could have organized the mechanics through the traditional means contemplated by the NLRA. Balanced against the policy of the NLRA to insure an antiseptic election and free choice by employees, a self-determination election among the mechanics was required.

2. THE MECHANICS DO NOT REPRESENT A HISTORICAL "FRINGE DEFECT" AS WAS INVOLVED IN *D.V. DISPLAYS*.

The Court of Appeals concluded that "as in *D.V. Displays* a fringe defect existed – employees properly included in the unit were not included – and that a self-determination election would perpetuate this defect." A-20. This conclusion is also wrong.

D. V. Displays did not involve an employer with two different groups of highly skilled employees for whom separate and distinct interests had been established in the record. The involved company was engaged in manufacturing custom displays and exhibits and the two groups at issue performed the same work on the same type of product; the only distinction between the groups was the market forces for which the product was made. The two groups of employees had the same skills and training. *Most importantly, the exclusion of one group from the unit was an historical accident that had caused a fringe defect in the historical unit; the fringe group existed at the time of the original unit determination and was excluded because of an oversight. D.V. Displays, supra,* at 569, 49 LRRM at 1201. A self-determination election under these circumstances could have perpetuated the fringe defect if the group voted to remain unrepresented. *Id.* at 571, 49 LRRM at 1201. The Board invoked a unit-wide certification election in *D.V. Displays* solely because a self-determination election would have perpetuated a fringe defect inconsistent with NLRA policy.

The proceedings before this Court are materially different. The mechanics' status as non-members of the

collective bargaining agreement is not an historical defect. Their common employment with the operators was a circumstance which naturally accrued based on changes in the construction industry and had nothing to do with the kind of inherent defect involved in *D.V. Displays*. This Court need only look to the applicable collective bargaining agreement in petitioners' cases to find additional support for this conclusion. It states that "the bargaining unit shall consist of all heavy equipment operators, as classified in Article VI . . . "; Article VI specifies the types of equipment to be assigned to these operators.[12] A-45.

The narrow application of the *D. V. Displays* rule is therefore apparent. Prior to the present case, the Board's practice has been to consistently order self-determination elections for previously unrepresented minority groups when representation has been sought by the union. See, *e.g.*,

---

[12] The Court of Appeals' reference to the collective bargaining agreement applicable to petitioners as containing the "classification of mechanic," see A-12, is unexplained by the court and reliance on it is misplaced. The term is referenced only once in the collective bargaining agreement, and only in the context of the different wage rates to be paid the **heavy equipment operators** for the different types of work performed. This clause is a relic from the 1930's when the Master Labor Agreement applicable to the equipment operators was first drafted and when construction machinery was mechanically unsophisticated and most lay-men could perform some repair and maintenance work. This did not remain true: technological developments such as the advent of hydraulic systems and diesel engines began to require special knowledge and skill to maintain and repair the equipment. The bargaining agreement does not contain a "mechanic" employee classification; and the scope provision specifically limits the entire agreement to "excavating, grading, landscaping, paving, landfill, and snowplowing with heavy equipment." *See* A-45.

Chrysler Corporation, 173 NLRB No. 160, 69 LRRM 1506 (1968) (union-sought self-determination election to add clerical staff to currently represented clerical unit); *Typographical Union, Local 88*, 196 NLRB No. 33, 79 LRRM 1691 (1972) (union-sought addition of proofreaders to existing unit; *Globe* election directed for proofreaders because unit had existed for many years and had not previously been included in the bargaining unit). The Court of Appeals held that the Board was not bound by its precedent in deciding petitioners' cases because in each of petitioners' cases there was a question of representation in the historical unit, i.e., the operators had not affirmatively designated their bargaining rights as employees. A-21. But as demonstrated, a question of representation did not exist in the historical unit of the heavy equipment operators.

IN THESE CIRCUMSTANCES THE BOARD WAS REQUIRED TO PROVIDE THE MECHANICS A SELF-DETERMINATION ELECTION.

The Court of Appeals concluded that "[t]he Board's decision to apply the rule in *D.V. Displays* and to deny a self-determination election only among the mechanics was a reasonable exercise of its statutory authority to conduct representation elections." A-21. The implicit finding that the issue was one of Board discretion is incorrect.

The Board's discretion pursuant to § 9(b) to determine the appropriate bargaining unit for collective bargaining purposes does not extend to create discretion over the substantive legal requirement to provide a self-determination election to a group of fringe employees whom the union seeks to accrete into an existing unit of employees who have already affirmatively delegated

their bargaining rights to the union.[13] Providing a self-determination election in these circumstances is not a matter of Board discretion. If a self-determination election is required as a matter of substantive law, a self determination election must be conducted. The Board's failure to conduct one, and the Court of Appeals' affirmation of the Board's action, are contrary to established precedent on the question and the purposes of the construction amendment to the NLRA.

SUMMARY AND CONCLUSION

Petitioners ask this Court to review the decision of the Seventh Circuit Court of Appeals and to provide their mechanics with the right to determine whether they wish to remain unrepresented or to be represented by the petitioning Union. The mechanics cannot be denied this right simply because the petitions at issue arose in the context of *Deklewa* recognition petitions.

Deklewa does not change the policy of the NLRA for self-determination elections, or *Globe*. *Deklewa* altered the means by which a § 8(f) contract may be repudiated or converted into a § 9(a) agreement, but nothing in the *Deklewa* decision may properly be construed as giving the Union the right to circumvent *Globe* or employee choice

[13] Petitioners do not argue that the Board abused discretion in not providing a self-determination election, but rather that in the circumstances presented, where the union seeks to enlarge an existing unit by unilaterally including a smaller in number group of previously unrepresented employees, a self-determination election among the fringe group is required as a matter of law.

to meet Union collective bargaining agenda. Absent review and reversal by this Court, self-determination elections in the construction industry will be nullified because of the ability to improperly use *Deklewa* certification procedures in § 8(f) contexts to avoid self-determination elections among construction workers who may desire to remain non-union represented.

Petitioners respectfully request that the Court grant certiorari, reverse the Judgment of the Court of Appeals, and require the Board to conduct self-determination elections among petitioners' mechanics prior to inclusion in the heavy equipment operators' established bargaining units.

Respectfully submitted,

ANNE B. SHINDELL
Counsel of Record
LAWRENCE M. SHINDELL
M. ELIZABETH BURNS
SHINDELL & SHINDELL
411 East Wisconsin Avenue
Milwaukee, Wisconsin 53202-4409
(414) 276-1100
Counsel for Petitioners

29 U.S.C. § 158 states in relevant part:

(f) Agreement covering employees in the building and construction industry. It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act [subsec. (a) of this section] as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act [29 USCS § 159] prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: Provided, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act [subsec. (a)(3) of this section]: Provided further, That any agreement which

would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e) [29 USCS § 159(c) or (e)].

29 USCS § 159

§ 159. Representatives and elections

(a) Exclusive representatives – Employees' adjustment of grievances directly with employer. Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

(b) Determination of bargaining unit by Board. The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act [29 USCS §§ 151-158, 159-168], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, that the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide

that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards of such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c) **Hearings on questions affecting commerce – Rules and regulations.** (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board –

> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) [subsec. (a) of this section], or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a) [subsec. (a) of this section]; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a) [subsec. (a) of this section];

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c) [29 USCS § 160(c)].

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act [29 USCS §§ 151-158, 159-168] in any election conducted

within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a runoff shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

(d) Petition for enforcement or review – Transcript. Whenever an order of the Board made pursuant to section 10(c) [29 USCS § 160(c)], is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f) [29 USCS § 160(e), (f)], and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part of the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

(e) Secret ballot – Limitation of elections. (1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made

pursuant to section 8(a)(3) [29 USCS § 158(a)(3)], of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

28 USCS § 1254

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 90-1586 and 90-2124
NEW BERLIN GRADING COMPANY, INC.,

Petitioner,
Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,
Cross-Petitioner,

and

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 139, AFL-CIO,

Intervenor-Respondent,
Cross-Intervenor-Petitioner.

Nos. 90-2174 and 90-2520
SUNNY SLOPE GRADING, INC.,

Petitioner,
Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,
Cross-Petitioner,

and

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 139, AFL-CIO,

Intervenor-Respondent,
Cross-Intervenor-Petitioner.

Nos. 90-2180 and 90-2519
SCHNEIDER EXCAVATING, INC.,

Petitioner,
Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,
Cross-Petitioner,

and

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 139, AFL-CIO,

Intervenor-Respondent,
Cross-Intervenor-Petitioner.

Nos. 90-2631 and 90-2862
STOEHR GRADING COMPANY, INC.,

Petitioner,
Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,
Cross-Petitioner,

and

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 139, AFL-CIO,

Intervenor-Respondent.

Petitions for Review and Cross-Applications
for Enforcement of Orders
of the National Labor Relations Board.

ARGUED FEBRUARY 26, 1991-DECIDED OCTOBER 22, 1991

Before FLAUM, RIPPLE AND MANION, *Circuit Judges.*

MANION, *Circuit Judge.* These consolidated cases involve petitions for review by four Wisconsin construction companies (New Berlin Grading Co., Sunny Slope Grading, Schneider Excavating, and Stoehr Grading Co.) of orders by the National Labor Relations Board finding that the companies committed unfair labor practices by refusing to recognize and bargain with the union certified to represent their equipment operators and mechanics. The NLRB has cross-petitioned for enforcement in each case.

I.

The four cases before us all arise from similar facts. (The details – such as the exact number of mechanics and operators at each company, and the precise duties of those employees – differ in each case but the differences are not important.) Each company performs excavating and grading for construction projects throughout Wisconsin. The companies employ heavy equipment operators who perform the grading and excavating, and one or more mechanics who maintain and repair the heavy equipment. (The companies also employ other employees who are not at issue in this case.) The companies all employed far more operators than mechanics.

For at least 20 years, each of the companies has been a member of the Wisconsin Excavators and Graders Association (WEGA). As WEGA members, the companies have been parties to what is commonly called a "pre-hire"

collective bargaining agreement with the International Union of Operating Engineers pursuant to § 8(f) of the National Labor Relations Act, 29 U.S.C. § 158(f) ("the Act"). Section 8(f) allows employers in the building and construction industry to enter into a collective bargaining agreement with a union before the union has attained majority status among the firm's employees. A § 8(f) agreement may also contain union security clauses, exclusive hiring hall provisions, and job referral requirements. See generally *International Ass'n of Bridge, Structural and Ornamental Iron Workers v. N.L.R.B.*, 843 F.2d 770, 772-73 (3d Cir. 1988) ("*Iron Workers*"), which discusses the history of pre-hire agreements under § 8(f) and the circumstances in the construction industry that led to § 8(f)'s passage.

In accordance with the § 8(f) agreement between WEGA and the union, the companies hired their heavy equipment operators through the union. Thus, the heavy equipment operators were union members when hired or became union members as a condition of employment, and were paid wages and benefits pursuant to the § 8(f) agreement. The mechanics, however, were a different story. Although the § 8(f) agreement included the classification of mechanic, the companies did not hire their mechanics through the union. The mechanics were not union members, and their wages and benefits were different than those of the equipment operators since the § 8(f) agreement was not applied to them.

Before 1987, a company was free to repudiate a § 8(f) pre-hire agreement any time before the union represented a majority of the employer's workers. However, if the union at any point during the pre-hire agreement's term

acquired the support of a majority of the employees, the agreement was "converted" to a standard collective bargaining agreement governed by § 9(a) of the Act, 29 U.S.C. § 159(a). After conversion, the union enjoyed a presumption of majority status for the term of the agreement, and the employer could no longer repudiate the agreement. See *N.L.R.B. v. Pacific Erectors, Inc.*, 718 F.2d 1459, 1462-63 (9th Cir. 1983) ("majority status . . . converts a voidable 8(f) agreement into a binding section 9(a) exclusive representation agreement." In 1987, the Board significantly changed its rules and policies regarding § 8(f) agreements by abolishing the conversion doctrine and holding that a pre-hire agreement is binding on and holding that a pre-hire agreement is binding on and enforceable by both parties. *John Deklewa & Sons*, 282 NLRB 1375 (1987). A union seeking the rights of a full-fledged majority union must go through the traditional certification process, which generally means filing a petition for certification and, if necessary, an election. *Id.* at 1385. A majority vote for the union results in the union's certification as the employees' collective bargaining representative "and the full panoply of Section 9 rights and obligations" that accompany that status. *Id.* A vote to reject the union voids the § 8(f) agreement and terminates the § 8(f) relationship. *Id.* the Third Circuit subsequently enforced the Board's decision in *Deklewa*, and this circuit has also approved that decision. See *Iron Workers*, 843 F.2d 770 (enforcing *Deklewa*); *N.L.R.B. v. Bufco Corp.*, 899 F.2d 608 (7th Cir. 1990).

The Board recognized that its *Deklewa* decision could spawn numerous election petitions by unions party to § 8(f) agreements. See *Deklewa*, 282 NLRB at 1386 n.46.

The cases here testify to that prediction's accuracy. After *Deklewa*, the union sought certification under § 9 as the bargaining representative of each of the companies' employees. In each case, the union sought an election among a bargaining unit consisting of the equipment operators, whom the pre-hire agreement already covered, and the mechanics, whom the pre-hire agreement did not cover. In each case, the company objected to including the mechanics in the unit. the Board held hearings in each case to determine the appropriate unit.

The first case the Board decided involved New Berlin Grading Co. After a hearing, the Board's Acting Regional Director determined that the operators and mechanics shared a sufficient community of interest to form an appropriate collective bargaining unit. But the Acting Regional Director also found – based on the facts that the mechanics and operators had different skills, duties, and supervision, and that the pre-hire agreement had never been applied to the mechanics – that the mechanics shared a sufficient separate "community of interest to determine whether they wish[ed] to be added to the unit" including the operators. *New Berlin Grading, Inc.*, No. 30-RE-4915, Acting Regional Director's Decision at 4. Therefore, the Acting Regional Director ordered a "self-determination election" among the mechanics so they could decide whether they wished to be represented by the union along with the operators. *Id.*

Upon the union's request for review, the Board decided that no self-determination election for the mechanics was necessary. The Board agreed with the Acting Regional Director's conclusion that the operators and mechanics shared a sufficient community of interest

to be placed in the same bargaining unit. Based on this, the Board concluded that only a single election in the entire unit was appropriate: "When, as here, there is a question of representation in the historical unit and the incumbent union seeks to add a previously unrepresented fringe group whom no other union is seeking to represent on a different basis, the Board will direct only one election, including all employees in the unit found to be appropriate. *D.V. Displays*, 134 NLRB 568, 571 (1961)." *New Berlin, supra*, NLRB decision at 2. As cases involving the other companies came up, the Board, based on its decision in *New Berlin*, directed single elections in the units comprised of operators and mechanics. The union won the elections at all four companies and was certified as the collective bargaining representative of the operators and mechanics at each.

Each company subsequently refused to bargain with the union. The union filed unfair labor practice charges against each company and the Board in each case found that the companies' refusal to bargain violated §§ 8(a)(5) and (1) of the Act, 29 U.S.C. §§ 158(a)(5) and (1). All of the companies petitioned for review, the Board cross-petitioned for enforcement, and this court consolidated the cases.

II.

The companies do not contest the Board's decision that units consisting of both operators and mechanics are appropriate units. Given that the units were appropriate, the only question before us is whether the mechanics,

who had not been union members, were entitled to separate elections to determine whether or not they wanted to be part of those units and be represented by the union.

Section 9(c) of the Act, 29 U.S.C. § 159(c), places the authority for conducting representation elections with the Board. When a union files a petition alleging that a "substantial number of employees" wishes to be represented by the union, the Board is to investigate the petition to determine if a "question of representation" exists. 29 U.S.C. § 159(c)(1). If the Board determines that a question of representation exists, then the Board is to conduct an election. *Id.* However, § 9(c) does not specify how the Board is to conduct the election, other than to say the election is to be by secret ballot. See *id.* The lack of standards for conducting the elections means the Board has broad discretion to determine the rules controlling elections. See *Mosey Mfg. Co. v. N.L.R.B.*, 701 F.2d 610, 615 (7th Cir. 1983). Therefore, we review the election rules the Board formulates only to determine if those rules are reasonable. See *id.*; *Bufco*, 899 F.2d at 611.

In these cases, the union filed petitions with the Board to be certified as the representative of units including the operators and mechanics. the Board found that questions of representation existed, determined that the units the union sought to represent were appropriate, and ordered elections in the units. Although this is standard Board procedure, the companies contend that the Board should have conducted separate self-determination elections among the mechanics because, in effect, a pre-existing union was attempting to add fringe groups of workers whom the union had never before represented. Generally, when an established union attempts to add

new members from among a fringe group of employees the union does not represent, the Board follows a two-step process. First, after the union files its petition and the Board determines a question of representation exists among the fringe group, the Board will determine whether the fringe group and the larger existing unit together form an appropriate unit. See *N.L.R.B. v. Southern Indiana Gas & Elec. Co.*, 853 F.2d 580, 582 (7th Cir. 1988). After the Board determines that the unit including both groups is appropriate, the Board will conduct a self-determination election among the fringe employees to determine whether they prefer to be represented by the existing unit or remain unrepresented. *Id.*

The companies argue that the Board should have treated these as cases where an established union was seeking only to add a fringe group of previously unrepresented employees. The companies point to the fact that under the § 8(f) agreement, the union had represented the equipment operators for over 20 years, while never representing (or even seeking to represent) the mechanics. While the operators had never actually voted for the union as their bargaining representative, the operators were union members (as a condition of their employment), and had never sought to have the union removed as their bargaining representative as § 8(f) allows. See 29 U.S.C. § 158(f) (allowing employees to file a petition under § 9(c) asserting that a union does not have majority support). As a practical matter, one could reasonably assert – as the companies do – that the union was so established with the operators that their preference for the union was a foregone conclusion and that the petition to represent a unit including the operators and the

mechanics was nothing more than an attempt to force formerly unrepresented members to be added to that established unit. The companies assert that to deny the mechanics a self-determination election under those circumstances trampled upon the mechanics' right to freely choose whether or not to be represented.

If the Board had chosen to conduct self-determination elections for the mechanics, that decision would have been reasonable in the circumstances of this case. But the Board instead chose to follow its decision in *D.V. Displays*, 134 NLRB 568 (1961). In *D.V. Displays*, several unions which had had contracts covering workers who produced custom displays with firms that manufactured such displays petitioned the Board for an election among the already-covered employees and various other employees at the firms. The petitioned-for unit would include, among others, production employees at one of the firms who did not work on custom displays, photographers, and maintenance workers. *Id.* at 568-70. In *D.V. Displays*, the Board found that a unit consisting of all production employees, photographers, and maintenance workers was appropriate, and that a question of representation existed concerning this unit.

In *D.V. Displays* the groups whom the union contracts had not previously covered constituted a fringe group. The Board had previously held that such fringe groups were not to be included in a historical unit "without first ascertaining whether or not they desire to be included." *Id.* at 571 (citing, *The Zia Company*, 108 NLRB 1184). The Board in *D.V. Displays*, however, decided to modify the rule calling for a separate election where "there is a question of representation in the historical unit and the

incumbent union seeks to add a previously unrepresented fringe group whom no other union is seeking to represent on a different basis. . . . " *Id.* In such a case, the Board decided that only one election among all the employees in the unit would be appropriate. *Id.* The Board gave two reasons for adopting the new rule. First the Board found it more consistent with its statutory responsibility to determine the appropriate unit to direct an election among the entire unit. To do otherwise might perpetuate a fringe defect in the historical unit. Second, the Board found that directing only one election was the more democratic approach because the single election would give all the employees in the unit an equal voice in choosing their bargaining representative. *Id.* at 571-72.

The companies do not challenge the reasonableness of the rule established in *D.V. Displays* but they do challenge its application to this case. As in *D.V. Displays,* however, the petitions here represented the first time a question of representation had been presented in the "historical unit." The companies' argument suggests that no real question of representation existed among the operators because of their union membership and long-standing coverage under the § 8(f) agreement. But the operators had to be union members to keep their jobs. The union's support had never before been put to the test in an actual election, and the Board did not have to conclude that the operators' support for the union was a foregone conclusion. There is no hint in *D.V. Displays* of any dissatisfaction with the union by the employees in the historical unit (the unions having filed the petitions); yet the Board directed only one election in that case for the entire unit.

The companies also argue that this case is unlike *D.V. Displays* because in that case the exclusion of the fringe employees from the historical unit had been an accident. The companies assert no such historical mistake occurred in this case because when the historical unit was formed, none of the companies even employed mechanics; the companies began to hire mechanics only as the companies grew and added their own repair and maintenance departments. The companies also emphasize that the mechanics are hired through different channels, are trained differently, and generally have different skills than the operators.

But while all this may be so, the point remains that the Board found that the operators and mechanics properly belonged together in the same unit. The companies do not challenge this finding. It is reasonable to conclude that as in *D.V. Displays* a fringe defect existed – employees properly included in the unit were not included – and that a self-determination election would perpetuate this defect. Further, it is reasonable to conclude that directing only one election, rather than giving part of the unit what amounts to veto power over whether to be included, is more consistent with the Board's statutory responsibility to determine the appropriate unit.

The companies maintain, however, that despite *D.V. Displays*, the Board has consistently allowed self-determination elections where the union has sought those elections, implying that the Board misapplied or has inconsistently applied its precedent. The companies also assert that this circuit has approved the use of self-determination elections. However, in the cases the companies

cite, no question of representation existed in the historical unit. See, e.g., *Southern Indiana Gas*, 853 F.2d at 582; *N.L.R.B. v. American Printers and Lithographers*, 820 F.2d 878, 880 (7th Cir. 1987); *Chrysler Corporation*, 173 NLRB 1046 (1968); *Duke University*, 227 NLRB 1627 (1977). The Board itself has expressly recognized this distinction. See *Photype, Inc.*, 145 NLRB 1268, 1272 & n.8 (1964). Where a question of representation exists only among the fringe group, it makes little sense to require a unit-wide election. Indeed, the Board has no authority to direct an election where no question of representation exists. See 29 U.S.C. § 159(c)(1). A self-determination election is the only way to allow the fringe employees any say as to their representation.

The Board's decision to apply the rule in *D.V. Displays* and to deny a self-determination election only among the mechanics was a reasonable exercise of its statutory authority to conduct representation elections. that being the case, we deny the companies' petitions for review, and grant the Board's petition to enforce its order.

A true Copy:

Teste:

_____

Clerk of the United States
Court of Appeals for the
Seventh Circuit

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRTIETH REGION

Waukesha, Wisconsin

NEW BERLIN GRADING, INC.

Employer

and

Case 30-RC-4915

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 139, AFL-CIO[1]

Petitioner

DECISION AND DIRECTION OF ELECTIONS

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,[2] the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

---

[1] The name of the Petitioner appears as amended at hearing.

[2] Timely briefs have been received from the parties and duly considered.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The Labor Organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

VOTING GROUP A:

All full-time and regular part-time equipment operators and apprentices employed by the Employer; excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.[3]

VOTING GROUP B:

All mechanics and apprentice mechanics employed by the Employer; excluding office

---

[3] The Petitioner seeks to include the classification of oilers and welders into this unit based upon their inclusion in the Petitioner's collective-bargaining agreements. The Employer does not now, and does not intend to employ any employees in those classifications in the foreseeable future. Accordingly, I shall not include them in this voting group. *Brown and Root, Inc., et al. d/b/a Ozark Dam Construction*, 77 NLRB 1136, 1141, fn. 13 (1948).

clerical employees, professional employees, guards and supervisors as defined in the Act.[4]

Contrary to the Employer, Petitioner seeks to accrete the mechanics and apprentice mechanic into its recognized unit (Voting Group A above). There are currently three mechanics and one apprentice mechanic. Petitioner has never represented or, until the instant case, sought to represent employees in those classifications. Likewise Petitioner seeks certification of its current recognized unit. Contrary to the equipment operators or apprentices, the mechanics and apprentice mechanics have not been hired through Petitioner's hiring hall.

The duties of the mechanics are to maintain and repair the equipment used by the operators. During the construction season, which lasts from about April to November, at least one of the mechanics works in the field as well as the shop. If a machine breaks down in the field, a mechanic will be sent to determine if it can be repaired on site or be brought into the shop. In the field

---

[4] Contrary to the Petitioner, the Employer contends that the Shop Manager is a supervisor as defined in Section 2(11) of the Act. The shop manager is responsible for the maintenance of all the Employer's equipment, including the heavy construction equipment. He orders parts, schedules maintenance and assigns work to the mechanics and apprentice mechanic. He participated in the interview of the current apprentice mechanic and effectively recommended that said employee be hired. In addition, the shop manager has issued written disciplinary warnings to employees, and effectively recommended the transfer of an employee from the shop to the field. Based upon the foregoing and the entire record, I find that the shop manager is a supervisor as defined in the Act, and that he is not eligible to vote in the elections directed herein.

the mechanic will consult with the foreman or the operator. If the repair is minor, taking less than an hour, it will be done at the job site; and the operator will wait or be given another piece of equipment. Otherwise, the equipment will be taken to the shop and the operator will be sent to another site or sent home. During the winter season, the mechanics work exclusively in the shop. The equipment operators are laid off during the winter.

The apprentice mechanic also works the entire year. During the construction season, he oils and greases the machines in the field. This takes about 10 minutes per machine. During that time he may have contact with the operator to determine whether the machine needs additional oil and/or water, and if there is a mechanical problem to be reported to the shop.

The mechanics and apprentice mechanic have different supervision from the equipment operators. They have separate skills. There are no mechanics who can operate the machines and there is only one operator who has the skills to be a mechanic. He did so during the winter of 1984, and for about 2 weeks in 1987 or 1988. About 5 of the approximately 32 operators occasionally grease their own equipment, and from 1984-1988, one operator, a member of the Petitioner, worked as a greaser as part of his duties. However, during that period, mechanics and laborers also did greasing. Other than the foregoing there has not been any interchange or transfers between the equipment operators and shop employees.

The Employer and Petitioner are party to two collective-bargaining agreements. The Wisconsin Excavators

and Graders Association, Area I Contract which is effective from June 1, 1988 to May 31, 1990. That agreement covers the Wisconsin counties of Milwaukee, Ozaukee, Waukesha, Washington, Racine and Kenosha, and includes, inter alia, the classifications of "oiler and greaser" and "mechanic and welder". The Heavy and Highway Construction Agreement runs from May 1, 1988 to May 1, 1991, and contains, inter alia, the separate job classifications of "mechanic or welder, heavy duty equipment" and "greaser". This contract covers the entire State of Wisconsin.

The foregoing evidence establishes that the shop employees do not have a sufficient community of interest to be automatically accreted into Voting Group A, the unit currently represented by Petitioner. On the other hand, there is evidence of sufficient community of interest such as integration of operations, multiple work-related contacts, significant common work locations and the traditional representation by Petitioner of employees who perform the work of mechanics and apprentice mechanics. I, therefore, find that the shop employees are not a separate craft, but have a sufficient community of interest to determine whether they wish to be added to the unit in Voting Group A. Accordingly, I am also directing a self determination election so that the mechanics and apprentice mechanic can exercise their choice of deciding whether they wish to be represented by Petitioner in an overall unit. *Sacramento Automotive Association, Valley Motor Car Dealers Council*, 193 NLRB 745, 746 (1971); *Phototype, Inc.*, 145 NLRB 1268, 1274 (1964).

In support of its position that the shop employees should be accreted to the operators unit, Petitioner contends that the parties' collective bargaining history

warrants such inclusion. *See P.J. Dick Contracting, Inc.*, 290 NLRB No. 24 (1988). However, in that case, as in the instant case, the Board examined other factors relevant to appropriateness of unit. As noted above there are some factors which show similar community of interests and some which do not. In the instant case, I am not persuaded that there is an extensive bargaining history with respect to the shop employees. Over the past 19 years, Petitioner has never sought to represent the shop employees through the grievance procedure, and has never sought to require the Employer to apply the contractual wages and fringe benefits to those employees. Thus, the facts herein are distinguishable from those in *Walker Boat Yard, Inc.*, 273 NLRB 309 (1984), relied upon by Petitioner, where all employees received the contractual fringe benefits. Finally, while Petitioner accurately may assert that there is no record evidence, it knew that the Employer did not apply the contracts to the shop employees, I find such claim to be unrealistic considering the normal practices and contractual provisions of having a steward on job sites and for union business agents to visit projects, the daily work-related contacts between the operators and the shop employees. Furthermore, there is no evidence that Petitioner did not know the Employer was not applying the contracts to the shop employees.

DIRECTION OF ELECTIONS[5]

Elections by secret ballot shall be conducted by the undersigned among the employees in the Voting Groups found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the Voting Groups who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible employees in Voting Group A shall vote whether or not

---

[5] Inasmuch as it appears that the construction season has commenced, and since there is no evidence that the Employer's work force of equipment operators and apprentices is not stable, and in view of the parties' stipulations, I find that neither *Dick Kelchner Excavating, Co.*, 236 NLRB 1414 (1978) nor *Daniel Construction Co.*, 133 NLRB 264 (1961) need be applied in determining voter eligibility.

they desire to be represented for collective-bargaining purposes by: International Union of Operating Engineers, Local No. 139, AFL-CIO. Those eligible to vote in Voting Group B shall vote whether or not they wish to be represented for collective-bargaining purposes by: International Union of Operating Engineers, Local No. 139, AFL-CIO.

If a majority of employees in Voting Group B cast valid votes for Local 139, they will be taken to have indicated their desire to be represented by Petitioner, and also if a majority of employees in Voting Group A cast valid votes for Local 139, the employees in Voting Group B will be accreted to that group; and the unit description will be as follows:

> All full-time and regular part-time equipment operators, apprentices, mechanics and apprentice mechanics of the Employer; excluding office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

In the event that a majority of valid votes in either Voting Group A or Voting Group B are not cast for Local 139, the appropriate certification will issue with respect to each Voting Group, respectively.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them.

Excelsior Underwear, Inc., 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 384 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, two copies of an election eligibility list for Voting Group A and two copies of an election eligibility list for Voting Group B. These lists shall contain the names and addresses of all the eligible voters, and upon receipt, the undersigned shall make the lists available to all parties to the election. To speed preliminary checking and the voting process itself, it is requested that the names be alphabetized on each list. In order to be timely filed, such lists must be received in the Regional Office, Suite 700, Henry S. Reuss Federal Plaza, 310 West Wisconsin Avenue, Milwaukee, Wisconsin 53203 on or before June 2, 1989. No extension of time to file these lists shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1717 Pennsylvania Avenue, N.W., Washington, DC 20570. This request must be received by the Board in Washington by June 9, 1989.

Signed at Milwaukee, Wisconsin this 26th day of May 1989.

/s/ Philip E. Bloedorn
Philip E. Bloedorn
Acting Regional Director
National Labor Relations Board
Thirtieth Region
Henry S. Reuss Federal Plaza
310 West Wisconsin Avenue,
Suite 700
Milwaukee, Wisconsin 53203

297 NLRB No. 127

SCD
D – 1126
Waukesha, WI

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

NEW BERLIN GRADING, INC.

and

Case 30-CA-10609

INTERNATIONAL UNION OF
OPERATING ENGINEERS,
LOCAL 139, AFL-CIO

DECISION AND ORDER

On October 15, 1989, the General Counsel of the National Labor Relations Board issued a complaint alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 30-RC-4915. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed its answer admitting in part and denying in part the allegations in the complaint.

On November 17, 1989, the Acting General Counsel filed a Motion for Summary Judgment. On November 20 the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The respondent filed a response.[1]

---

[1] In its response, the Respondent, inter alia, joins in the Motion for Summary Judgment.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer the Respondent admits its refusal to bargain, but attacks the validity of the certification on the basis of the Board's unit determination in the representation proceedings.

All representation issues raised by the respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

Findings of Fact

I. Jurisdiction

The Respondent, a corporation with an office and place of business in Waukesha, Wisconsin, is engaged in grading and excavation work at construction sites throughout the State of Wisconsin, where it annually purchases and receives at its Waukesha, Wisconsin facility goods and materials valued in excess of $50,000

directly from suppliers located outside the State of Wisconsin. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. The Certification

Following the election held August 10, 1989, the Union was certified on August 18, 1989, as the collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time equipment operators, apprentices, mechanics and apprentice mechanics of the Employer; excluding office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

Since September 19, 1989, the Union has requested the Respondent to bargain, and since September 19, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

Conclusions of Law

By refusing on and after September 19, 1989, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.[2]

To ensure that the employees are accorded the services of their selected bargaining agent for the period

---

[2] The Respondent's contention that, until the Board's certification has been tested in a court of appeals and is there upheld, the Union is not entitled to any remedy is without merit. The cases cited by the Respondent all concern the award of extraordinary remedies for egregious violations of Sec. 8(a)(5) beyond those normally granted by the Board. *Clothing & Textile Workers v. NLRB*, 815 F.2d 225 (2d Cir. 1987); *Peabody Coal Co. v. NLRB*, 725 F.2d 357 (6th Cir. 1984); *Lipman Motors v. NLRB*, 451 F.2d 823 (2d Cir. 1971). Rather than supporting the Respondent's contention, each of the cases cited by the Respondent affirms the Board's discretion in fashioning an affirmative remedy under Sec. 10(c) in order to effectuate the policies of the Act. Moreover, it is well settled that collateral litigation does not suspend the duty to bargain under Sec. 8(a)(5) of the Act. See, e.g., *Bob's Big Boy Family Restaurants*, 264 NLRB 432, 434 (1982); *Montgomery Ward & Co.*, 228 NLRB 1330, 1331 (1977) (see fn. 8 and cases cited).

provided by law, we shall construe the initial period of he certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (19620; *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, New Berlin Grading, Inc., Waukesha, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with International Union of Operating Engineers, Local 139, AFL-CIO as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time equipment operators, apprentices, mechanics and apprentice mechanics of the Employer; excluding office

clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

(b) Post at its facility in Waukesha, Wisconsin, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. February 20, 1990

James M. Stephens, Chairman

Mary Miller Cracraft, Member

Dennis M. Devaney, Member

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with International Union of Operating Engineers, Local 130, AFL-CIO as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time equipment operators, apprentices, mechanics and apprentice mechanics of the Employer; excluding office clerical employees, professional employees,

guards and supervisors as defined in the Act, and all other employees.

NEW BERLIN GRADING, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 310 W. Wisconsin Avenue, Suite 700, Milwaukee, Wisconsin 53203-2201, Telephone 414-291-3866.

RONALD L. BONK

OFFICIAL REPORTER
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

BRUCE BOHMANN,

Plaintiff,

v. Case No. 89-C-891

NATIONAL LABOR RELATIONS BOARD, et al.

Defendants.

August 2, 1989

TRANSCRIPT OF PROCEEDINGS

Proceedings had in the above entitled matter before the Honorable Robert W. Warren, judge of said court, upon pleadings filed herein.

APPEARANCES:

Ms. Ann Shindell
Attorney at Law
appeared on behalf of plaintiff.

Mr. Phillip E. Bliedorn and
Mr. George Strick
Attorneys at law
appeared on behalf of defendants.

EXCERPT OF PROCEEDINGS

[p. 2] MS. SHINDELL: Because they will be adversely affected by being wrapped, they will lose benefits, the union counsel's comment that the company has violated the agreement by failing to pay wages and benefits is not correct. These people are, in most cases, compensated above the rates, they would argue, apply, they participate in company profit sharing; they have paid vacations, and they get special training and other benefits because of their unique trade.

They will also have to pay the union initiation fees which are quite substantial, monthly dues, and they will have to tender to the union as a condition of employment, one and one half per cent of every dollar they earn as gross wages.

THE COURT: Is that correct, Mr. Streckel?

MR. STRECKEL: That's right.

THE COURT: And substantially what counsel has said would be your testimony to what you would say?

MR. STRECKEL: Exactly; the union has nothing to offer me that I don't already have.

THE COURT: Is that also true of what your testimony would be, Mr. Bohmann?

MR. BOHMANN: Yes, it is.

THE COURT: And Mr. LeCaptain?

[p. 3] MR. LE CAPTAIN: Yes, it is.

THE COURT: And Mr. Rudolph?

MR. RUDOLPH: Yes, it is.

THE COURT: Well, then I would opinion, gentlemen, or counsel, that we can dispense with the testimony of the individual testimony of each of these witnesses because I think their testimony, their live testimony really there is no fight about what it would be. The question is what the law is here.

JUDGE'S DECISION

THE COURT: Okay, well, as you are well aware, federal courts are courts of limited jurisdiction, anybody that comes into court has the obligation of establishing that jurisdiction, and the Court has the obligation of inquiring into it itself, if the parties do not establish it, if you haven't got jurisdiction, you have got no business in deciding the matter.

Now I have never pretended to know or to like labor law, and I have had some terrible cases brought in here, but I am satisfied that the National Labor Relations Act in many ways is a departure from the democracy as many of us might envisage it in normal governmental functions because I think it's very clear that the desires of the minority can be submerged as a [p. 4] result of a certification election, and I know it's also very clear from the case law that the federal courts are not given the same review power, the same review authority that they have in many areas of the law. Was this done consciously by Congress, I suppose it has all sorts of historical antecedents, and I understand why the writers of the act perhaps did what they did, but it's clear that as to what I suppose you'd call the merits of the NLRB Act itself, the review is centered

either in the circuit courts of appeal, for certain areas it's in the board itself, and in certain areas I guess you'd say the final appeal is to Congress here. I think that the only case that's advanced that I see would have helped me to feel that I had jurisdiction is the *Leedham* case which is quoted at or which is cited by both parties. *Leedham et al. v. Members of the National Labor Relations Board v. Kind*, 358 U.S. 184 and there, as we have discussed, the distinction was that you had a board that had a very clear and concise obligation to differentiate between professionals and non-professionals in their certification elections. And as I understand it, that was clearly set forth in the statute, and that board in that case had not done so. So the district court was faced with a situation where it was not really interpreting [p. 5] the act, but it was being called into the foray in order halt, under its general equitable powers, a government agency that had overstepped its bounds and had acted in violation of the statute, and the case law makes it pretty clear that that is about the only kind of exception to the sort of substantive appeal that should be going down to the 7th Circuit and not into the district courts. I have listened closely and tried to discern from plaintiff's argument just what the violation, the clear-cut violation was here under Section 7 that would justify the Court taking the extraordinary position of listening to this as an equitable powers injunction case under Rule 65. I frankly think she's put up a valiant fight, but I don't see it, and so, therefore, the Court is forced to the conclusion that it just doesn't have the jurisdiction here.

I think that it's clear that if the election is held and certification ensues that there are any number of avenues,

a fair representation, all sorts of them that can be used by the petitioners here in order to get the review in the 7th Circuit that it would desire. But I think it would be inappropriate and probably beyond the power of this Court to entertain a Rule 65 injunction to prevent the injunction from [p. 6] occurring; and, therefore, the Court will decline to exercise jurisdiction in this matter, even though my sympathies are inclined to run with the four individuals here, and I wish I didn't have to do this, but I don't see that I have any power.

If you will prepare a short order, consonant with this declination of jurisdiction, Board, why I will sign it.

* * *

STATE OF WISCONSIN)
) SS
MILWAUKEE COUNTY)

I, Ronald L. Bonk, an Official Court Reporter for the Eastern District of Wisconsin, do hereby certify that I reported the foregoing proceedings at the time and place specified in the title page of said transcript and that the foregoing is a full, true and correct transcription of my stenographic notes thereof.

/s/ Ronald L. Bonk
OFFICIAL COURT REPORTER
UNITED STATES
DISTRICT COURT

ARTICLE VI

JURISDICTION AND CLASSIFICATION

Section 6.1. The Contractor hereby agrees to assign any equipment within the jurisdiction as described below to bargaining unit employees: the operation of all hoisting and portable engines on building and construction work where operated by steam, electricity, diesel, gasoline, hydraulic or compressed air, butane, propane or other gases and nuclear or atomic power, limited to the following: pumps, siphons, pulsometers, concrete mixers (14S and over) and concrete pumps, street rollers, power shovels, trench hoes, pile driving rigs, cranes, clamshells, draglines, powered derricks, track or rubber sidebooms, cableways, mounted or towed compactors, drills (track or wagon type), hoists, tuggers, forklifts, endloaders, dinky locomotives, mulching machines, concrete finishers (self-propelled), asphalt plants and pavers, power jacks (slip-form work), boilers, heaters, boring machines (horizontal), concrete breakers and tampers (self-propelled), manhoists, generators, shouldering machines, trenchers, bulldozers, scrapers, motor patrols, well points, screeds (power-propelled), welding machines, tower cranes, rotary drill, (except hand drills and/or jackhammers), dredge barges, tugboats, floating equipment (marine), overhead cranes, conveyors and augers, (concrete), chippers (brush and stump), winch trucks, A-frames, loading machines (powered or self-propelled), power brooms and sweeper (tractor-mounted or towed), prestress machines, locomotives, winches (powered), milling machines, screed operator milling machine, and all equipment specified in Article XXVI.

Section 6.2. New or Unlisted Equipment. Should new or unlisted equipment within the claimed jurisdiction of the International Union of Operating Engineers be utilized for which no wage rate appears in this Agreement, the Union and the Association, acting on behalf of the Contractors party to this Agreement, shall meet and agree on the wage rate to be paid for its operation.

If the parties are unable to agree on a wage rate, the issue shall be submitted to arbitration under the provisions of Article VIII.